NOVA SCOTIA COURT OF APPEAL
Citation: *Marson v. Nova Scotia*, 2017 NSCA 17

Date: 20170209
Docket: CA No. 449683
Registry: Halifax

Between:

Laura Marson (nee Doucette)

Appellant

v.

Her Majesty in Right of the Province of Nova Scotia and David Grimes

Respondents

Judges:	Van den Eynden, Saunders and Scanlan, JJ.A.
Appeal Heard:	December, 7, 2016 in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Scanlan, J.A.; Saunders and Van den Eynden, JJ.A. concurring.
Counsel:	David G Coles, Q.C. and Alix Digout (Articled Clerk), for the appellant Duane A. Eddy, for the respondents

Reasons for judgment:

Background

[1] Persons of authority must always be aware of the damage that may flow from mistakes they may make. Under the veil of a limited authority, Mr. Grimes, a provincial firearms officer, unwittingly managed to negatively impact the life and career of an innocent victim, the appellant.

[2] The appellant was, by all accounts, an excellent student in a corrections and policing program. Ancillary to that program, in 2011, she applied for a firearms license in the Province of Nova Scotia. A firearms officer with the Province, Mr. Grimes, was assigned to review the appellant's application. As part of the review he met with the appellant and a number of collateral contacts. During those various meetings, for some unexplained reason, Mr. Grimes spread slanderous lies about the appellant. He went so far as to suggest that she was involved in an armed robbery. (See the trial judge's decision reported as *Doucette v. Nova Scotia*, 2016 NSSC 25 for a complete description of the slanderous comments that Mr. Grimes disseminated.) That, along with other slanderous comments, resulted in an interruption and delay of the appellant's completion of the corrections and policing program.

[3] After the appellant was confronted with the allegations made by Mr. Grimes, she initially understood that she could not go to any On The Job training (OJT) which was an essential aspect of her program. As such, she understood she had been suspended from the program. Eventually her status was clarified and Ms. Doucette returned to, and completed, her program including the OJT. Mr. Grimes' baseless allegations had a profound effect on the appellant's mental health.

[4] The appellant sued both Mr. Grimes and his employer which I refer to as the Province. When I refer to Mr. Grimes and the Province collectively I refer to them as the respondents. As part of their defence, the respondents had initially pled a defence of justification, maintaining that the allegations of the appellant's criminal activity and other statements made by Mr. Grimes were true. Shortly before the trial commenced the respondents withdrew the justification defence.

[5] Ms. Doucette's claim also included an allegation that Mr. Grimes disclosed what should have been confidential information, to persons or institutions that he came into contact with during his licensing investigation.

[6] Mr. Grimes used the unfounded/fabricated allegations as the basis to deny the appellant the firearms licence she had applied for. That license was eventually granted after the application was considered by a different investigating officer. The license was a requirement for many of the jobs available to graduates of the corrections/policing program.

[7] The trial judge, Justice Denise Boudreau, perhaps best summarized the actions and impact of Mr. Grimes saying:

> [125] In the case at bar, the defendant Grimes' statements were clearly defamatory. His actions were offensive and inexplicable. His task was an investigation of the plaintiff's application for a firearms license; by no measure did he appropriately accomplish his task. Rather, he used the opportunities presented by his position to cause havoc in the life of the plaintiff. He attended the plaintiff's school and reported rumours and allegations of serious criminal and other inappropriate conduct to her instructors. He reported rumours to her training placement. He did this in complete ignorance of whether the allegations were true, and with complete lack of diligence in determining their truth. He even presented his own ill-founded speculations and accusations.
>
> [126] He did this all wearing the cloak of a provincial DOJ *(Department of Justice)* investigator, with all the credibility such a title would bring. He attended at the plaintiff's school where he knew she was training for a law enforcement career, and where he knew allegations of criminal activity would have to be of enormous concern. And all of this he did in cavalier fashion, with entirely callous disregard for the results his words would have….

[8] The trial judge awarded damages as follows: general $35,000, aggravated $15,000, special damages $2,640 and prejudgment interest $3,652.19. The appellant takes issue with the types and quantum of damages awarded.

[9] After the main decision was rendered, the trial judge received submissions on costs. In a decision reported as *Doucette v. Nova Scotia, 2016 NSSC 78* she ordered the defendants to pay costs in a total amount of $15,000 plus reasonable disbursements. The appellant argues on appeal that the costs award was inadequate in the circumstances of this case.

Issues

[10] In relation to the main decision there were several grounds of appeal which I summarize and distill as follows:

- the trial judge erred in failing to award damages for breach of privacy;

- the trial judge erred in failing to award punitive damages;
- the trial judge failed to award an appropriate quantum of aggravated damages;
- the trial judge erred in not awarding separate damages against the Province of Nova Scotia based on the principle of vicarious liability; and
- the trial judge erred in making findings of fact not based on the evidence.

[11] In appealing the decision on costs, the appellant asserts the trial judge erred in awarding costs based on Scale 3 of the Tariff. The appellant alleged the trial judge made several errors:

- misapprehension of the plaintiff's "limited" opposition to the defendants' motion to amend its defence shortly before the start of the trial;
- erroneous determination that pretrial offers were compliant with Rule 10(c);
- giving no weight to plaintiff counsel's affidavit attesting to time and hourly rate;
- diminishing the per diem counsel fees by two days; and
- failing to award solicitor-client costs or alternatively not increasing costs for the unwarranted prolonged plea of justification.

[12] The respondents argue that the trial judge made no error in determining the appropriate heads or quantum of damages.

[13] On the issue of costs the respondents submit that despite the length of time it took to complete the trial, the matter was quite simple and straight forward. The defendants had withdrawn the defence of justification prior to trial and all that was left for trial was the issue of proving the heads and quantum of damages. They submit that the costs awarded are appropriate and that this Court should not interfere with the decision of the trial judge.

Standards of Review

[14] Given the diversity of the grounds of appeal there are mixed standards of review:

- appeals from decisions on points of law are reviewed for correctness;
- an error of law which is extractable from a mixed question of fact and law is also subject to the standard of correctness;
- factual matters including inferences and mixed fact and law, with no extractable error of law, are reviewed for palpable and overriding error. (see *Kidder v. Photon Control Inc.*, 2012 BCCA 327, ¶ 40; *Davison v. Nova Scotia Government Employees Union*, 2005 NSCA 51, ¶ 63; *Creager v. Nova Scotia (Provincial Dental Board)*, 2005 NSCA 9, ¶14;); *Schwartz v. Canada*, [1996] 1 S.C.R. 254, ¶ 34; and *Brown's Civil Appeals* (Canvasback Publishing: Toronto, Ontario: 2013 p. 14:7)

[15] In *Kern v. Steel*, 2003 NSCA 147, Oland J.A. noted the standard of review when the appeal involves an assessment of damages saying:

> [43] A court of appeal is not to alter a damage award made at trial unless it concludes that there was no evidence upon which the trial judge could have reached the conclusion he (she) did, or he (she) proceeded upon a mistaken or wrong principle, or where the result at trial was wholly erroneous; *Woelk v. Halvorson* (1980), 114 DLR (3d) 385 (S.C.C.) ¶ 388.

[16] The standard of review on appeal of costs is stated in *Binder v. Royal Bank of Canada*, 2005 NSCA 9:

> [52] Costs are in the discretion of the trial judge. This court will not interfere in a judges exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice: *Conrad (Guardian Ad Litem of) v. Snair*, [1996] N.S.J. No. 164; *D.C. v. Children's Aid Society of Cape Breton (Victoria)*,[2004] N.S.J. No. 470 (NSCA); *Fraser v. Westminer Canada Ltd.*, [2005] N.S.J. No. 89, 2005 NSCA 27

Analysis

Quantity and Types of Damages

[17] In my comments below I separate many of the issues for ease of analysis but in cases such as this, the issues are often interrelated, or overlapping. For example, the issues of aggravated damages, punitive damages and costs were specifically referred to by the trial judge as being interrelated. I agree with her in that regard.

[18] I also make a general observation in terms of the appellant's written and oral submissions. Many of the appellant's complaints are related to the fact that, in her decision, the trial judge did not recite all relevant evidence. The appellant suggests that manifests a failure on the part of the trial judge to consider essential aspects of the case thereby resulting in an error of law. I disagree. Trial judges are not obliged to refer to every piece of relevant evidence when rendering decisions. This is explained in *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights Board of Inquiry)*, 2008 NSCA 38 where Saunders J. A. wrote:

> [30] A judge is not obliged to mention every piece of evidence which he or she considered and may have chosen to accept or reject in disposing of the matters in dispute. Here, in an articulate and comprehensive decision the Board carefully reviewed the material evidence in a way which can leave no doubt as to either her appreciation of the issues, or the line of reasoning she applied in coming to the result. …
>
> …
>
> [32] … As this court recently observed in *2446339 Nova Scotia Limited v. A.M.J. Campbell Inc.* 2008 N.S.J. No. 30, 2008 NSCA 9 at para 90, it is important to emphasize that:
>
> > Deficiencies in a trial judge's reasons do not afford a free standing substantive right of appeal in the civil context, any more than in a criminal context.
> >
> > …

[19] On appeal, the issue is whether the decision, as written, allows for meaningful appellate review. Stated differently is the decision, as written, so deficient that it impedes the exercise of the right of appeal? I am satisfied that in this case the 58-page decision of the trial judge was comprehensive and provided a clear line of reasoning that leaves no doubt as to the trial judge's understanding and appreciation of the issues and the evidence. The reader is left in no doubt as to how the trial judge came to make the decision which she did. Where appropriate, the trial judge clearly and correctly explained how particular aspects of her disposition impacted others.

[20] The trial extended over a period of five days and it would be inconceivable that the trial judge, in her decision, would refer to each witness or every aspect of their evidence. That is not what one should expect of trial judges. A recital of evidence does little to inform the parties as to the reasoning of the trial judge. It is for the trial judge to make it clear what evidence she found of import and the material facts as she found them, based on the evidence. The record here supports

the trial judge's findings and conclusions. In addition, the trial judge, in a clear and methodical approach, explained the law as it applied to those facts. Where appropriate, the trial judge referenced other cases that supported her approach. Where those cases had taken a somewhat divergent approach to issues such as punitive and general damages, she explained why they were to be distinguished or why she adopted the approach she did.

General damages including damages for breach of privacy

[21] Although the general damage award is not the subject of appeal, it is related to the other heads of damages and, as such, I wish to review some of the trial judge's comments on the issue of general damages.

[22] The trial judge awarded general damages in the amount of $35,000, saying that amount fell in the mid-range of similar cases. She noted that the extent of the publication of the defamatory comments is important, but she refused to attempt to consider each act in isolation (separate silos) and then do a mathematical calculation as urged by the plaintiff. She correctly determined that it was not appropriate, in the context of this case, to make separate awards for each publication of the defamatory statements. She noted:

> [132] The defamatory statement about the plaintiff's involvement in "criminal activity" was made directly to three people, and indirectly to two more. The defamatory statements relating to her employment history were made to two people. I simply take that factor into account, along with all the other factors here. It does not rise to the level of those cases where the dissemination was in a public forum, such as the media or the internet. I also note the plaintiff is an "ordinary" member of the community; in keeping with the caselaw, awards for such plaintiffs are never excessive.

Factors relevant to the damage awards

[23] The trial judge did consider the full extent and nature of the dissemination of the defamatory comments. The law does not require that she consider each dissemination separately, so long as she considered the totality of what occurred. I have already quoted ¶132 where the trial judge correctly noted that, for an "ordinary" member of the community, awards are never excessive. The trial judge (¶140) was not persuaded that Mr. Grimes pursued his course of action in an intentionally malicious way, or that he targeted the plaintiff for harm. Instead, he was described (¶141) as being completely reckless, with an appalling disregard for

the plaintiff's reputation and dignity. These were among the various factors that the trial judge felt relevant to the issue of both types and quantum of damages.

[24] She also considered the issue of continuing impact on the plaintiff's career in law enforcement (¶129). That was also relevant to the issue of special damages. She was satisfied the plaintiff was not prevented from pursuing these career goals. Special damages were awarded for the time and work lost because of the delayed completion of the program.

[25] The trial judge considered several cases relevant to the issue of general damages: *Gouin v. White*, 2013 ABQB 332; *Neuls v. Toffoli*, 2011 SKQB 58; *Elgert v. Home Hardware Stores Ltd.*, 2011 ABQB 71; *McCaslin v. Biden*, 2002 SKQB 525; *Pressler v. Lethbridge*, 2001 BCSC 694; *Ayangma v. NAV Canada*, 2000 PESCTD 17; *Hiltz and Seamone Co. v. Nova Scotia (Attorney General)* (1999), 173 N.S.R. (2d) 34 (C.A.); and *Barltrop v. Canadian Broadcasting Corporation* (1978), 25 N.S.R. (2d) 637 (S.C.(A.D.)). All are supportive of the trial judge having correctly identified the range of general damages applicable to this case. She logically explains, through reference to the evidence and the case law she relied upon, why she found the appropriate general damages to be mid-range. I see nothing which would justify this Court in interfering with the trial judge's decision as regards general damages. I again refer to *Kern*.

Breach of privacy/intrusion upon seclusion

[26] The appellant complains that the trial judge failed to address the issue related to Mr. Grimes' improper disclosure of information concerning the appellant's mental health. That was privileged and confidential information which came into Mr. Grimes' hands as part of his investigative powers. The same can be said of the information attained from the Canadian Police Information Centre about the appellant's prior involvement with police authorities.

[27] The trial judge was alive to the potential to award damages for "Breach of Privacy/Intrusion upon seclusion". She discussed the issue of whether there was any need to rely upon an Ontario case, *Jones v. Tsige*, 2012 ONCA 32, which recognized the tort of intrusion upon seclusion. In *Jones* the Court made an award based on the tort of invasion of privacy, or intrusion upon seclusion. That case referenced the fact that one who intentionally intrudes upon the seclusion of another in his private affairs is subject to liability for invasion of privacy if the invasion would be highly offensive to a reasonable person. A reasonable person, in

the context of that tort, would find it highly offensive to have records such as health records, or in the context of the present case, confidential policing/corrections information disseminated.

[28] The *Jones* case made it clear that the damages for such a tort were in the category of "symbolic" or "moral" damages where a plaintiff suffered no provable pecuniary loss. Here, the trial judge correctly pointed out that while in *Trout Point Lodge Ltd. v. Handshoe*, 2012 NSSC 245 it was made clear that the court could award damages for a tort of intrusion upon seclusion, it was not necessary in the present case. She said:

> 175 … I do not need to undertake that analysis. The actions complained of under this heading are, essentially, the same actions underpinning the defamation claim, for which I have already awarded complete damages. The factors noted in par. 87 of *Jones* have already been considered in that award. It would be inappropriate to make further awards. …

[29] I agree with the trial judge's approach on this issue. The approach argued by the appellant would have resulted in double recovery for the same delict. The trial judge's comments make it clear that the intrusion of seclusion was subsumed within the other heads of damages.

Aggravated Damages

[30] The trial judge awarded $15,000 in aggravated damages. The appellant argues that is not sufficient. Again, she suggests that because the trial judge did not refer to all the evidence in her decision, she must have failed to consider relevant factors and, therefore, she erred in law.

[31] I repeat, a trial judge is not required to recite or refer to all the evidence relevant to every issue. I am satisfied there was no identifiable error made by the trial judge on the issues related to aggravated damages. There was evidence to support each of the trial judge's conclusions and final determination as to the quantum of aggravated damages.

[32] There are a number of factors that are relevant to the issue of aggravated or punitive damages. The trial judge referred to many of those aggravating factors. I have already referred to the trial judge's finding that Mr. Grimes' actions were in many regards inexplicable but she was not satisfied he was "intentionally malicious". She said:

> 140… I do not find that he intentionally targeted the plaintiff for harm, or that he completely invented untrue and defamatory stories with a view to disrupting the plaintiff's life. …
>
> 141 However, I do find that Mr. Grimes showed a completely reckless, I would say appalling, disregard for the plaintiff's reputation and dignity. As a firearms investigator, he was privy to certain statements made by third parties. Mr. Grimes did absolutely nothing to verify the correctness of the information he received.
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> (emphasis in the original)
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> 142 For reasons I cannot fathom, Mr. Grimes then chose to go about, to the plaintiff's school and training placement, spreading and discussing this information. They were lies. Mr. Grimes embellished upon the information, with his own outrageous and ill-founded speculation.
>
> 143 The statements he made were not in relation to innocuous or inconsequential behaviour; they clearly suggested criminal behaviour on the part of the plaintiff. Coming from a person in Mr. Grimes' position, such information would be considered to have great weight and be enormously serious.

Those passages clearly captured the essence of the aggravating circumstances of what Mr. Grimes did.

[33] The trial judge also considered the limited apology and lack of remorse of Mr. Grimes. She also considered the defendants' reliance upon a defence of 'justification' withdrawn only shortly before trial. This late withdrawal was despite earlier realization by the Province that the assertion of the truth of the derogatory comments was not based on evidence or fact. The trial judge was critical of the delay in withdrawal of the justification defence. She considered cases which had set aggravated damages in the amounts of $10,000 and $5,000 (*Lapointe v. Summach*, 2003 BCCA 709 ($10,000), *McCaslin v. Biden* ($10,000), and *Neuls v. Toffoli* ($5,000). She went on to hold that $15,000 was appropriate in this case.

[34] I see no error in her delineation of relevant factors and application of the relevant case law. The $15,000 is more than the amounts awarded in the cases the trial judge referred to and relied upon. As will be seen below, when I discuss punitive damages, it is apparent that the punitive aspect of this case helps to explain the increased amount.

Punitive Damages

[35] The trial judge turned her mind to the issue of punitive damages. At trial the appellant argued that punitive damages should be awarded, relying on *Trout*. The trial judge distinguished *Trout* saying it involved dissemination over the internet, which by its very nature, is widespread, anonymous and with unknown consequences. The present case involved limited dissemination to persons identified by the trial judge. Even though the appellant suggests that there was one additional person who received the information in question, it does not change the fact that there was not widespread dissemination.

[36] The consequences of the limited dissemination of that information were clearly considered. The trial judge considered (¶ 165) the "highly reprehensible" degree of conduct of Mr. Grimes as being similar to cases where punitive damages were awarded. She also determined that the harm caused to the plaintiff was substantial, "but short-lived".

[37] In relation to the Province she referred to the training that had been implemented subsequent to and as a result of this case. The objective of the training was to ensure that provincial employees, including Mr. Grimes, did not repeat this type of behaviour and that they understood what their obligations were in terms of confidentiality. Also, the trial judge concluded that Mr. Grimes had learned from this experience and that he would not make the same errors again. These are all factors relevant to the issue of punitive damages.

[38] On the issues of denunciation and deterrence the trial judge said of punitive damages:

> [167] In my view, the compensatory awards I have already made will adequately achieve the objective of deterrence and denunciation. No additional amount is required.

[39] While the comments of the trial judge make it clear that she understood the principles upon which punitive damages are awarded, it is also clear that she concluded, based on the facts of this case, that separate punitive damages were not required. Her decision is clear in showing she had already included many of the factors normally relevant to punitive damages under the heading of aggravated damages. The cases she referred to support her approach in that regard. If the factors relevant to the quantification of punitive damages were considered when awarding general or aggravated damages, a trial judge must take care not to

compensate for the same delict twice. In this case, the trial judge chose to factor the punitive aspects of the case when determining the other heads of damages. I see no error in her doing that.

Vicarious liability

[40] The trial judge found that the defendants were jointly and severally liable for the damages and costs of the appellant. The appellant says that this is not enough. She argues there ought to have been a separate assessment of damages against the Province and by failing to do so the trial judge erred. The argument appears to be premised on the Province failing to issue an apology and the delay in withdrawing the defence of justification.

[41] With respect, this argument is without merit. There is nothing in the record to suggest that the employer committed any separate wrong independent of Mr. Grimes. The Province did not in any way benefit from Mr. Grimes' actions, nor did it contribute to or encourage what he did. The carriage of the action and the delay in withdrawing the defence of justification were otherwise considered by the trial judge when assessing both damages and costs. There is no reason to consider them separately.

Did the trial judge make factual findings not based on the evidence?

[42] This ground of appeal is substantially related to the other grounds of appeal. In her factum, the appellant suggests the trial judge failed to appreciate the defamatory comment that Mr. Grimes made in asserting that the appellant had received a "criminal discharge in relation to a minor domestic dispute". The evidence supports that he made the statement and that it is simply not true. The appellant asserts that it is a distinct slander and caused distinct distress, deserving of separate compensation.

[43] I am not convinced that the trial judge palpably misapprehended that aspect of the case. As noted above, I am satisfied the trial judge appropriately considered all the evidence on the overlapping of issues, liability and damages.

Costs

[44] I have already noted that although this matter consumed five days of trial, it was in reality a straightforward damages claim. Costs were awarded to the plaintiff in the amount of $15,000 plus disbursements. At trial the appellant asked for costs

of more than $130,000. This in a case where the total recovery was $52,640 plus prejudgment interest of $3,652.19. The appellant has not succeeded in having that damages amount increased on appeal.

[45] There are five factors the appellant asked this Court to consider in relation to costs:

- the fact that the defendant did not withdraw the defence of justification until shortly before trial;
- the defendant made two offers to settle prior to trial which the appellant suggests were non-compliant with the Rules protocols and should, therefore, not have an impact on the costs award;
- the trial judge allowed only three days counsel fees for a five day trial;
- the trial judge refused to consider the time and fees affidavit as filed by the plaintiff's counsel absent evidence as to actual costs to the client;
- the trial judge misapprehended the plaintiff's "limited" opposition to the defendant's motion to amend its defence shortly before the trial.

The Justification Defence

[46] The defence of justification had been withdrawn prior to trial although the appellant submits that the defence should have been withdrawn much earlier, arguing that the failure to do so should have resulted in solicitor-client costs, at least for the time prior to the defendant withdrawing the defence of justification.

[47] I disagree with the appellant. In this case, the trial judge clearly indicated that she had taken the justification defence and the timing of its withdrawal into account when awarding damages:

> 18 The plaintiff also submits that a decision to plead justification, in and of itself, may lead to increased costs awards, as an "aggravating" factor. As I noted in my earlier decision, McConchie and Potts state in *Canadian Libel and Slander Actions*:
>
> > An unsuccessful plea of justification may be taken into account by the court when assessing damages. Depending on the circumstance, a failed plea of truth may aggravate the plaintiff's damages or underpin an award of exemplary damages. It may also lead to a more substantial award of costs against the defendant. (Toronto: Irwin Law, 2004) at p. 501

[emphasis added by Justice Boudreau]

> 19 I awarded aggravated damages against the defendants in my decision. In my view this award encapsulates all of the aggravating features that exist in this matter. I do not see that solicitor client costs are also required.

[Emphasis added]

[48] This approach is consistent with other cases where courts have taken into account a failed or withdrawn justification defence in the damages award. (See: *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181; *Neuls v. Toffoli, supra*; *Tremblay v. Campbell*, 2010 NLCA 62; *Griffin v. Sullivan*, 2008 BCSC 827; *Leenan v. Canadian Broadcasting Corp*. (2000), 48 O.R. (3d) 656 (aff'd (2001) 54 O.R. (3d) 612 (C.A.), leave refused [2001] S.C.C.A. No. 432); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.)

[49] The trial judge clearly considered and measured damages taking into account the defence of justification. It would be inappropriate for the trial judge to 'punish' the defendants for the same delict by awarding solicitor-client costs or increased costs as well. Once aggravated damages were awarded, taking into account the plea of justification, and the late withdrawal of that defence, it was open to the trial judge to exercise her discretion in awarding costs through the ordinary application of the Nova Scotia *Civil Procedure Rules.*

Settlement offers

[50] The appellant argues that the trial judge erred in taking the settlement offers made by the Province prior to trial into account when determining costs. There were three offers, each replacing earlier offers and each less than the previous. The trial judge ruled that the offers were not compliant with Rule 10(c) of the *Nova Scotia Civil Procedure Rules* because the offers did not contain any provisions as to 'protocols for costs'. The appellant argues the trial judge, therefore, erred in relying upon the settlement offers.

[51] The first offer, made on October 21, 2015, was in the amount of $75,000. It was withdrawn and replaced with offers of $60,000, then $50,000. As I have noted above, the total recovery was damages of $52,640 plus prejudgment interest of $3,652.19 and costs of $15,000 plus disbursements.

[52] The trial judge said of the first offer:

> 31 The finish date here was August 21, 2015. This offer was made in October. By the provision of Rule 10.09(3)(d), no deduction would be made.
>
> 32 Rule 77.07(2)(b) provides that I can still take an offer of settlement into consideration, despite it not falling squarely within the four corners of Rule 10. I further note that the offer of $75,000 was made after the motion to amend had been filed, but before hearing of that motion.
>
> 33 Therefore, as the offer was late, I make no specific deduction. However, it is a fact that I still take into account in my assessment of costs for the plaintiff.

[53] The purpose of the Rules related to settlement offers is to reduce costs for the respective parties to litigation. Courts have repeatedly emphasized the benefits pf early resolution of matters. Early settlement minimizes the expense to the parties, both the victors and the vanquished. Although the offers may not have complied with all aspects of the Rules so as to fall within Rule 10, the trial judge was correct in her determination that the offer was something that she was entitled to consider under Rule 77(2)(b). That Rule provides:

> 77.07(1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
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> …
>
> (b) a written offer of settlement, whether made formally under Rule 10 – Settlement or otherwise, that is not accepted;

[54] In view of the final recovery and the offers to settle, I agree with the trial judge that Rule 77.07(2)(b) was in play. How it impacted the final costs award is not set out in detail.

[55] There were other factors relevant to the issue of costs. The trial judge was satisfied that both counsel had engaged in conduct that had caused unnecessary work and/or expense to the other party. Absent clear evidence to the contrary to suggest a trial judge erred, an appeal court must accept a trial judge's assessment as to the impact counsels' behaviour had on the conduct of a trial. Here the record supports the trial judge's findings. Trial judges have the unique advantage of watching a case as it unfolds and assessing how the actions of counsel impact on the efficiency of the trial. Clearly, in this case, the trial judge was not impressed

with the conduct of either counsel as concerns this issue. That is somewhat reflected in the costs award. In this case the trial judge reduced counsel fees for the plaintiff and only allowed the plaintiff to recover counsel fees for three of the five days of trial. I refer again to the fact that liability had been admitted and this case was simply about damages.

[56] In view of the limited recovery by the plaintiff, in terms of what was being asked when compared to the final amount recovered, it could hardly be said that the plaintiff was the victor in the court below. This is especially so when one considers the $75,000 offer that was made well before the trial. Even though it is questionable as to whether there was a victorious party, the trial judge still awarded tariff costs and counsel fees for three of five trial days.

[57] The trial judge rejected the plaintiff's request for solicitor-client costs. She was aware of the various factors relevant to her exercise of discretion on the issue of costs. The application of Rule 77, and the divided success of the parties at trial, is reason enough to justify the trial judge in awarding a lesser amount than she may have otherwise awarded.

[58] The appellant complains that the trial judge improperly refused to consider evidence as to counsel's time, and hourly rate, in the absence of evidence as to any contingency fee arrangement or actual costs to the plaintiff. The trial judge acknowledged that she was not entitled to lift the privilege attached to solicitor-client fee agreements. She found she did not have evidence as to actual fees to be incurred by the plaintiff. Absent further information, the pre-bill could do nothing more than reveal the hours expended on the plaintiff's file.

[59] On appeal the appellant referred to *National Bank Financial Ltd. v. Potter*, 2014 NSSC 264 in support of her argument. I am not convinced that case supports the appellant. In that case, Justice Warner specifically declined to award lump sum costs as requested by the successful parties saying:

> [163] … - the absence of good evidence of the actual legal expenses incurred by the successful Plaintiffs, I agree with NBFL's submission that the evidence is nebulous as to the actual fees that the successful Plaintiffs owe Dunlop. Evidence of these parties' actual legal expenses is a relevant consideration in determining whether to award a lump sum. ….
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> …
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> [194] The Court declines to award a lump sum pursuant to *CPR 77.08*. *CPR 77.08* is, in my view, primarily aimed at fulfilling the underlying goal of awarding

> substantial indemnity for reasonable legal expenses. In this case, the absence of some evidence as to what the actual solicitor-client costs are, is an impediment to an award under *CPR 77.08*. …
>
> …
>
> [200] I decline to award a lump sum pursuant to *CPR 77.08* to reflect the principle of substantial contribution to their reasonable legal expenses because there is inadequate evidence of what their legal expenses will or should be. …

[60] In the case on appeal the trial judge, as in *National Bank,* did not have knowledge of what the actual legal fees would be. She had the added factors of settlement offers that approached or exceeded the total recovery as well as the inefficiencies of the litigation process that I have referred to above.

[61] I repeat my earlier comment that this really boiled down to a relatively straight forward assessment of damages. As to the work and effort of the plaintiff's counsel, I repeat what the trial judge said: "…both parties have engaged in conduct within this litigation that have caused unnecessary work and/or expense to the other party." This finding is relevant to the issue of costs. It is a reasonable inference that the effort it took to cause the other side unnecessary work or expense also came at a cost to the respective clients.

[62] Costs are discretionary and a judge's decision on costs deserves a great deal of deference on appeal. In this case the trial judge had the unique advantage of hearing the parties over five days on the trial proper. I repeat the standard of review applicable to the issue of costs as stated in *Binder v. Royal Bank of Canada,* 2005 NSCA 94:

> [52] Costs are in the discretion of the trial judge. This court will not interfere in a judges exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest in justice: *Conrad (Guardian Ad Litem of) v. Snair,* [1996] N.S.J. No. 164; *D.C. v. Children's Aid Society of Cape Breton (Victoria),*[2004] N.S.J. No. 470 (NSCA); *Fraser v. Westminer Canada Ltd.,* 2005 NSCA 27.

[63] I am not satisfied that the trial judge applied any wrong principle of law or that her decision on costs was so clearly wrong as to amount to a manifest injustice.

Disposition

[64] I would dismiss the appeal.

Costs on appeal

[65] The normal rule of costs on appeal is 40% of the costs awarded at trial, plus reasonable disbursements. The parties aptly suggested that guideline was appropriate in this appeal. Costs in favour of the respondent are set at $6,000, inclusive of disbursements.

Scanlan, J.A.

Concurred in:

Saunders, J.A.

Van den Eynden, J.A.